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Supreme Court of the United States

OCTOBER TERM—1942

No. 30

LAWRASON RIGGS, JR., Special Guardian,

Petitioner,

—against—

GIOVANNI DEL DRAGO, MARCEL DEL DRAGO, BYRON CLARK, JR., as Executor, HAROLD HASTINGS, Special Guardian, CORN EXCHANGE BANK TRUST CO., as Trustee,

Respondents.

ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK

BRIEF FOR RESPONDENTS GIOVANNI DEL DRAGO AND MARCEL DEL DRAGO

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Law Brief Press—NYC

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ON WRIT OF CERTIORARI TO THE SURROGATE'S COURT OF NEW YORK COUNTY, STATE OF NEW YORK

BRIEF FOR RESPONDENTS GIOVANNI DEL DRAGO AND MARCEL DEL DRAGO

The decision of the New York Court of Appeals (reported in 287 N. Y. 61) invalidates under the Supremacy Clause so much of New York Decedent Estate Law sec. 124 as seeks to change the incidence of the federal estate tax. It rests upon alternative grounds.

The Court of Appeals first examined the history and background of the tax, from which the Court concluded that "Congress has acted in the field" and "has expressly directed the manner of payment of such duties and excluded specific legatees from bearing the burden of any such levy" (R. 71). The invalidity of sec. 124 under the Supremacy Clause of the Federal Constitution was thought to follow.

The Court found several reasons why Congress should have wanted to adopt a tax which would not fall upon, or be distributed among, the legatees under a will (R. 65).

The Court of Appeals also held that even if Congress had not so explicitly indicated its purpose, New York could not change the incidence of the tax because in the circumstances and in view of the nature of the power exercised "silence does not give consent but implies only that there shall be no interference with the federal scheme" (R. 71). Underlying this view is the belief that the federal estate tax system is a comprehensive and independent taxing system and that the States are not free to disturb its uniform incidence.

The dissenting opinion in the Court of Appeals acknowledges this "command of the federal statute that * * * the tax be paid out of the net estate" (R. 79). But it asserts that Decedent Estate Law sec. 124 is not in conflict with that command because, it is further asserted, Congress was and is indifferent to the incidence of its tax. This assertion of fact derives from and is supported principally by reference to the *dictum* in Judge Hough's opinion in *Edwards* v. *Slocum*, 287 Fed. 651 at 653, aff'd. 264 U. S. 61.

That *dictum* is plausible, but it is incorrect (p. 10 *et seq.*, *infra*).

The Purpose of Decedent Estate Law Sec. 124.

Decedent Estate Law sec. 124 was adopted in 1930 when New York substituted an estate tax for its prior inheritance tax (Laws 1930, c. 709; see *Whitney* v. *Tax Commission*, 309 U. S. 530, 536). It was put forward as insuring a more equitable incidence for the new estate tax than would otherwise ensue. But this belief must be viewed in the light of its New York history.

Before 1930, the death duty in New York was a "share" tax falling upon the recipients of legacies or distributive shares (Tax Law, Arts. 10 and 10-A). The objection to an estate tax falling upon the estate itself was that it disturbed local practice and would affect wills drawn by lawyers accustomed to a different tax incidence. On precisely this ground, Governor Smith in 1928 and Governor Roosevelt in 1929 vetoed bills for an estate tax (S. Pr. #1913, Int. # 1093, April 5, 1928; A. Pr. #1041, Int. #967, April 15, 1929). Governor Smith in his veto message observed that "under the estate tax as proposed by this bill the entire tax is paid by the residuary legatee"* while "under a transfer tax system which our State has consistently followed, each legatee and each beneficiary pays the tax on the benefit that he derives from the estate." And he rejected the bill because "this bill radically changes the system established for over 40 years by the State of New York for the taxation of the estates of deceased persons."

When the measure was reintroduced in 1930, sec. 124 (Appendix 2) was substituted for the provision directing the incidence of the tax upon the estate. But it does not merely prescribe the incidence of the New York tax. It also shifts the incidence of the federal estate tax from the estate and on to the legatees. The purpose to substitute local for national uniformity is also evident from the statement made on the floor of the State Senate.**

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* The bill contained a provision (sec. 249-bb) identical with the federal law (now 26 U. S. C. A., sec. 826-b—see Appendix 1), which directs that the tax should fall on the estate.

** "At the present time the federal tax is against the residuary legatees. Under the present law of the State of New York the inheritance tax is distributed. What we are proposing now is that both the State tax and the federal tax shall be allocated by the Surrogate to the legatees or distributees in accordance with their interests" (Senator Mastick, April 10, 1930).

The rejected provision of the proposed law, the cause of the Gubernatorial vetoes, had declared the legislative "purpose and intent * * * that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution," and it made provision for reimbursement from the estate for a legatee who had been made to bear "any part" of the tax (see pp. 21-24, *infra*). It is the provision made in the federal law (26 U. S. C. sec. 826-b; Appendix 1). Sec. 124 reverses it and makes the opposite provision for reimbursement: the executor does not make reimbursement of the federal tax to the legatees, he receives reimbursement from them.

The incidence of the federal estate tax. The federal estate tax (26 U. S. C. A. secs. 810, *et seq.*) is not an "inheritance" or "transfer" tax upon the privilege of receiving property by will. It is a tax upon the estate, upon the interest which ceases by death (*cf. Knowlton* v. *Moore*, 178 U. S. 41 esp. at 48, *et seq.*). It is a levy upon the estate before its distribution to any of the beneficiaries, and it falls upon the residue and is not apportioned among the legatees.

Many decisions so fix its incidence, refusing to apportion its burden (*Matter of Hamlin*, 226 N. Y. 407, cert. den. 250 U. S. 672; *Farmers L. & T. Co.* v. *Winthrop*, 238 N. Y. 488, cert. den. 266 U. S. 633; *Matter of Oakes*, 248 N. Y. 280, per Cardozo, *J.*; *In re Newton's Estate*, 74 Pa. Super. Ct. 361; *Plunkett* v. *Old Colony Trust Co.*, 233 Mass. 471; *Turner* v. *Cole*, 118 N. J. Eq. 497; *Bemis* v. *Converse*, 246 Mass. 131; *Ericson* v. *Childs*, 124 Conn. 66, reviewing the authorities; compare *New York Trust Co.* v. *Eisner*, 256 U. S. 345; *Y. M. C. A.* v. *Davis*, 264 U. S. 47; *Edwards* v. *Slocum*, 264 U. S. 61).

The petitioner does not dispute the soundness of these holdings but rather assumes that they illustrate a "local" and "judge made" rule of "state law" (br. pp. 8, 12, 47

footnote, 37, 44). But they determine a question involving the meaning and the effect of a federal statute. We should have thought this to present a federal question to be answered in the light of the Congressional intent rather than upon the varying standards of State law, for "in the interpretation and application of federal statutes, federal not local law applies" (*Prudence Realization Corp.* v. *Geist*, 316 U. S. 89 and cases cited at p. 95; *cf. Lyeth* v. *Hoey*, 305 U. S. 188 discussed pp. 39-40, *infra;* Cheatham, Review, 55 Harv. L. Rev. 167-8). Such is the assumption of the carefully considered opinions of the New York and Massachusetts Courts, *supra*, which do not speak at all of local policy but reach their conclusions upon careful appraisal of the evidence regarding the intent of Congress.

In any event, it is clear that the point which petitioner thus assumes is the very point at issue in the present case: whether New York is in truth free to reverse the incidence of the tax imposed by the national government.

The equities of sec. 124. Although substantial opinion supports the view that in New York it is more equitable to apportion death taxes rather than to allow their incidence to fall upon the estate,* it is enough to note here (as the Court of Appeals has noted on three separate occasions) that the matter is susceptible of difference of opinion (*Matter of Hamlin, supra*, 226 N. Y. at 420; *Farmers Loan and Trust Company* v. *Winthrop, supra*, 238 N. Y. at 496-7; opinion below, R. 103).

Moreover, the federal law seems to have been written upon the opposite premise. The result of apportioning an estate tax is that the general legatees bear a tax measured, not by

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* We assume that the investigation by the New York Commission into this question of fact was more thorough than its investigation of the constitutional power of the State. The Commission cited only the dictum of Judge Hough (pp. 10, 27, *infra*) and *Hill* v. *Grissom*, 299 Fed. 641, an irrelevant decision (see pet. br., pp. 10-12).

the size of their legacies, but by the amount of the net estate. Injustice will often ensue and inequalities are unavoidable—as, for example, where a small legacy is given out of a large estate. The strongest animadversions upon any such method of measuring the tax will be found in the leading case in this Court on federal death taxation, where Mr. Justice White warned in no uncertain terms of its "profound inequality" (*Knowlton* v. *Moore*, 178 U. S. 41 at 77; see also *Matter of Sherman*, 179 App. Div. 497 at 500, aff'd 222 N. Y. 540; *Newton's Estate*, 74 Pa. Super. Ct. 361; *cf. Matter of Adler*, 151 Misc. 338). When a testator leaves a general legacy of a specific sum of money, it is difficult to be certain that it is always fair to reduce that sum by way of taxes, since the result is only to augment the necessarily indefinite residuary estate. Indeed the *relevance* of imposing upon a general legacy a tax measured not by the size of the legacy but by the size of the estate from which it comes is not apparent (*Farmers Loan & T. Co.* v. *Winthrop*, 238 N. Y. 488 at 496-7).

In the present case, sec. 124 does operate unjustly. The respondents, husband and stepson of the testatrix, are her general legatees (R. 50-51). Comparison of her earlier Wills discloses that they were the natural and the only consistent objects of her bounty (R. 42, 44, 45-6, 48). Comparison also shows that the draftsman of her Will overlooked the effect of the new sec. 124 upon their legacies when in 1932 he drew a codicil and republished the prior Will (R. 45); and that her last Will merely perpetuated that error. But sec. 124 will substantially reduce their legacies—by approximately twenty per cent.—and will confer the benefit of that reduction upon infants in Italy who are favored for the first time in her last Will (R. 50-51, *cf.* R. 48-9, 46-7).

It is thus apparent that there is basis for the observation by the draftsman of the federal estate tax (Mr. Cordell

Hull) who in 1916 described the incidence of the federal tax as "this *equitable* method of imposing it upon the entire net estate before distribution" (p. 14, *infra; cf. Stebbins* v. *Riley*, 268 U. S. 137 at 145). And Congress has since directed apportionment of the tax in limited respects only and in circumstances which strongly suggest that only in those respects did such distributed incidence appear "more equitable" (pp. 33-35, *infra*).

The truth would seem to be that there is no panacea; that no single rule will do justice in all circumstances. What is clear, however, is that under the federal law the testator may regulate the incidence of the tax (26 U.S.C.A. sec. 826-b); and the least experienced of draftsmen will write a tax clause in a Will as quickly as he provides for payment of debts and funeral expenses (see Report to National Conference on Estate and Inheritance Taxation, Nov. 10, 1925, pp. 37-9). Consequently we find it difficult to subscribe to the implication of counsel that many Wills have been written in New York upon the assumption that they will be governed by section 124 (pet. br., p. 12). Statutes change while the words of a Will do not.

Summary of Argument.

Section 124 of the New York Decedent Estate Law is in conflict with the federal estate tax law and unconstitutional under the Supremacy Clause (Const. Art. VI, cl. 2);

First, it conflicts with the purpose of Congress (actually expressed in sec. 826-b, Internal Revenue Code) that its tax fall upon the estate—a purpose rendered necessary by objections from the States, as well as by constitutional considerations;

Second, it interferes with the tax in a pecuniary way; and

Third, it interferes with the uniform operation and incidence of the tax without Congressional assent to such interference.

These conflicts are not justified by reliance upon the reserved power of the States over the distribution of estates.

1.

Congress stated its purpose in sec. 826-b of the Internal Revenue Code where it directed that: "unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution." Decedent Estate Law sec. 124 is in actual conflict with that command.

Congress was not indifferent to the incidence of the tax; neither did it seek to discriminate against residuary legatees. Congress designed the tax to fall upon the estate itself because it desired that its tax should not be distributed among the legatees like the existing legacy taxes levied by the States. Congress intended that the tax should harmonize with and be a supplement to the State taxes and not merely be superimposed upon them. In view of the political and constitutional setting in 1916, any other kind of federal death tax was inexpedient.

Today section 124 constitutes as a practical matter a barrier to Congressional adoption of legacy taxes as part of a comprehensive and perhaps exclusive system of death taxation—fields which must however be left open for future action.

2.

Section 124 actually interferes with the federal estate tax in that it reduces the sum otherwise due to the United States in any case in which any or all of the residue of the estate is given to charity—reducing the tax substantially.

3.

Congress has had continually under consideration the question whether it should alter the incidence of its estate tax. It has in fact adjusted the incidence of the tax in certain particulars, but has declined to do so broadly. There is no room for further adjustment by the States.

In any event, in this field the absence of Congressional assent to State regulation implies that there shall be no interference by the States. Otherwise the national tax system cannot operate uniformly, particularly since State regulation of the incidence of the federal tax is inappropriate and often unworkable.

4.

The States have reserved power over the distribution of estates, but—unless the Supremacy Clause is to be forgotten—that does not justify their interference with the incidence of the federal tax as designed by Congress. Suggested presumptions concerning the intention of the testatrix or of Congress with respect to sec. 124 only beg the question.

This Court observed, in 1893, that it faced for the first time the attempt of a State to interfere with federal taxation (*United States* v. *Snyder*, 149 U. S. 210 at 214). There has since been only one such instance (*Flaherty* v. *Hanson*, 215 U. S. 515). This is hardly surprising. Why should the States be free to regulate the incidence of *any* tax levied by

the national government? Surely no one would so intimate with respect to the payroll tax under the Social Security Law, or a federal sales tax placed on the seller and not the buyer. Taxes are often instruments of social policy and their incidence the major factor in the effectuation of that policy.

POINT I.

Congress placed the incidence of the tax upon the estate because it desired that the tax should not be distributed among the legatees.

We address our attention to the claim, insistently put forward in the briefs before this Court and in the dissenting opinion below (R. 75, *et seq.*), that Congress had no interest in fixing the incidence of its estate tax—a claim which undoubtedly has had currency, due principally to the words of Judge Hough in *Edwards* v. *Slocum* (see p. 27, *infra*). But we recognize no substitute for examination of the evidence.

The fact is that Congress intended, when in 1916 it enacted its first estate tax, that the tax should not fall like an "inheritance" or "share" tax upon each of the shares. In order to avoid conflict with the States, the tax was designed to fall differently from existing State taxes and upon the estate only. It was pointed out at the time that this must mean that the tax is taken from the residue of the estate and not the shares. And provision was accordingly made (Revenue Act of 1916, sec. 208, now I. R. C. sec. 826-b).

But it is a misconception of the decision below, to urge that it finds that Congress was motivated by the sole purpose to thrust its tax upon the residue of any estate. Its different point was twice stated: that Congress wanted its tax to fall

"without recourse to the individual legatees" (R. 73, 66). The consequence follows naturally that the tax must fall upon the residue when there is a residue.

The Political Background in 1916.

The estate tax of 1916 was the first federal death duty adopted in peacetime. At the time of its proposal it met with intense opposition in behalf of the States. It was preceded by ten years of debate by economists and tax experts (Schultz, Inheritance Taxation, pp. 155-6). The argument earnestly advanced—on theoretical as well as practical grounds—was that taxation at death is the prerogative of the States which the federal government ought not to invade.*

The Congressional answer to these objections lay in the fact that the States were not then occupying the whole field of death taxation.

Identical Committee reports on the bill placed their emphasis on that fact. They pointed out that although forty-two of the States were levying death taxes in 1916, none was an estate tax; that in each State the tax was a legacy tax, falling upon the recipients of the shares; and that in twelve of the States the tax was imposed only upon collateral relations (House Rep. #922, 64th Cong., 1st Sess., p. 5). It was therefore insisted that a federal tax which would be confined to the estate and which would not fall

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* As petitioner states, "practically the entire discussion of the revenue bill so far as it dealt with the estate tax revolved around this question" (br. pp. 29-30). See 53 Cong. Rec. 10659, 10730, 10731, 10752, 10761, 13043, 13044, 13060, 13130, 13188, 13191, 13192, 13297, Appendix at 1403-5, 1406, 1408, 1499, 1708, 1709.

The National Tax Association consistently opposed a federal estate tax on these grounds (Proc. Nat. Tax Cong. 1907 at p. 662; 1908 at p. 25; 1912 at pp. 176-9, 195-7).

Some of the States also opposed, i.e. Rhode Island Laws 1916 at p. 382; and compare 53 Cong. Rec. App. 1404 *et seq.*

upon the shares would not compete with the taxes of the States. On the contrary it was stated that the two systems would supplement one another.

Of course the States opposed adoption of federal death taxes whatever their nature; but what is relevant here is the manner in which that opposition was met and overcome.

Mr. Hull's Statement.

The underlying conception was stated on the floor of Congress by Mr. Cordell Hull (53 Cong. Rec. 10656-7). Mr. Hull has admitted to authorship of the estate tax law (Nat. Confer. on Inheritance and Estate Tax; Feb. 1925, pp. 104-5).

Mr. Hull in his statement took note of the opposition in behalf of the States. He referred to the systems of death taxation prevalent on the continent of Europe, and in Great Britain. He pointed out that in those countries the national government collected all death taxes and remitted a portion to the political subdivisions. He further observed that the British death tax system simultaneously levied *both* estate and inheritance taxes. This is not unusual. This Court had earlier noted in *Knowlton* v. *Moore*, 178 U. S. at 51 that the federal death tax of 1864 was in this respect a copy of this dual English system (see Appendix 3, at p. 54 *et seq.*, *infra*).

During and immediately following the first world war, after sustained periods of agitation for such a system: France, Germany, Austria and most of the British possessions adopted Estate taxes as a supplement to their existing legacy taxes. (Schultz, Inheritance Taxation (1926) pp. 18-29, 75, 77, 80, 91, 96, 214; Hanson, Death Duties, appendix; Proceedings of Nat. Con. on Inh. & Estate Tax (Feb. 1925) pp. 59-60; Paul Jaeggy, Erbschafts und Schenkungs Steuer abhandlungen aus dem Schweizer Recht, Pamphlet 88, c. 9, p. 17.) Indeed Congress in 1935 very nearly adopted a legacy tax as an addition to the Estate Tax (p. 29, *infra*).

Where the rates are properly adjusted, the two forms of tax do not conflict but are supplementary to one another and form a logical tax structure: so run the formidable rationalizations of the economists*. Mr. Hull not only subscribed to that view, he also sought to demonstrate that such was the place of the proposed federal estate tax in its relation to existing State taxes.

He pointed out that the greater part of estates, passing to direct heirs, escaped State taxation—in part this was because of the low rates for immediate heirs, and in part because many of the existing State taxes were levied only upon collateral relations.** And he stated that consequently a

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* Professor Seligman to the National Conference on Inheritance and Estate Taxation, Feb. 1925 (Report of Proceedings, pp. 58-60):

> "While the share tax rests upon the idea of individual obligation, the estate tax rests upon the idea of social obligation. In the share tax we think of the duty of the recipient; in the estate tax we think of the relation of the estate as a whole to the society which helped to make it possible. The defence in both cases, as in that of every direct tax, is ability to pay or fiscal capacity. But whereas in the share tax the ability is conceived of as an individual matter, in the case of the estate tax it is conceived of as a social matter. *In a well-rounded system of inheritance taxes or death duties we need both the individual and the social elements; that is, we need both the share tax and the estate tax.*"

See also Carl Plehn, Introduction to Public Finance (1921 ed.) 204; Seligman, Reducing Inheritance Tax Difficulties, 3 Nat. Inc. Tax. Mag. 145.

The estate tax operates on the "back tax" theory, *i.e.*, to reach into the estate for taxes which the deceased should have paid in his lifetime. West, The Inheritance Tax, page 205; Seligman, Essays in Taxation (1925), page 136. The inheritance tax on the other hand looks to the recipients of the shares. It measures the tax on a *quid pro quo* basis, *i.e.*, by the benefit to the legatees rather than by the size of the estate. Schultz, Inheritance Taxation, p. 216 *et seq.*

** "In pursuit of exact equity under State share tax laws the estate is divided and subdivided, and often again subdivided, until the shares become so small that even very high rates afford but comparatively small and disappointing revenues"

* * * * * *

"Experience teaches us that three-fourths of the value of real estate passing by death goes to direct heirs. The reason the States get very little revenue from their inheritance laws which impose a tax chiefly on collaterals is obvious" (p. 10657).

federal tax which would fall upon the estate itself would not be in conflict with the States' taxes (p. 10657):

> "The effect of the rates carried in the pending estate tax bill when considered as a supplement to our State taxes on shares of estates will not be unjust or unreasonable; on the contrary, the State laws and the proposed Federal law, when considered as a combined tax measure, so supplement each other as to make the entire tax imposed by each more equitable than heretofore. The State laws have a rather high graduation on the shares of collaterals which the proposed measure does not impose. The States tax the smaller estates and shares thereof. The two systems taken together, therefore, do not conflict, but constitute a better rounded piece of fiscal legislation."

The assumption underlying is of course that the federal estate tax would not be apportioned. Mr. Hull went on to make it explicit. He first described the incidence of the proposed tax in a case of intestacy:

> "Under the general laws of descent the proposed estate tax would be first taken out of the net estate before distribution, and distribution made under the same rule that would otherwise govern it."

And then:

> "Where the decedent makes a will he can allow the estate tax to fasten on his net estate in the same manner, or if he objects to this equitable method of imposing it upon the entire net estate before distribution he can

> insert a residuary clause or other provision in his will, the effect of which would more or less change the incidence of the tax." (p. 10657).

This cannot with reason be read to mean that the incidence of the proposed estate tax is to be governed by State law. Mr. Hull described the incidence of the tax as 'fastening' upon "the entire net estate before distribution"—whether in intestacy or where there was a will. If the testator should not find "this equitable method" suitable—the method of "imposing it upon the entire net estate before distribution"—he would then be free to change "the incidence of the tax."

Plainly Mr. Hull conceived of the simultaneous and harmonious operation of the federal estate and the State share taxes. Indeed he criticized his proposed estate tax because it "is not within itself a comprehensive bill"—since "an estate tax in this country should carry suitable rates and should be combined with a well balanced system of share taxes when viewed as a permanent measure." He envisioned the ultimate collection of all death taxes by the national government with a distribution of some of the proceeds to the States, as is the practice abroad:

> "I have prepared for discussion and consideration a measure designed to accomplish this result. I contemplate formally introducing it at a later date." *

Mr. Hull's meaning is illuminated by reference to the printed Senate research document from which he obviously drew heavily; his statement is in many respects a colloquial restatement of its text (Sen. Rep. 114, 61st Cong., 1st Sess.)—see Appendix 3.

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* The House Committee seems to have entertained a "tentative plan" for such a system in 1916. See 53 Cong. Rec. app. 1403, Rep. Curry.

His subsequent statement in 1925 of the theory of this first federal estate tax, made to the Conference of Inheritance Tax Commissioners, further clarifies his views.*

The Statements of the Congressional Committees.

Mr. Hull was not alone in this conception. It permeates the identical report of the House and Senate Committees in charge of the bill:

> "Thirty States have laws imposing inheritance or share taxes both upon direct and collateral heirs. Twelve other States have laws imposing inheritance taxes upon collateral heirs. Your committee deemed it advisable to recommend a Federal estate tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees or devisees and legatees.
>
> " 'The Federal estate tax recommended forms a well-balanced system of inheritance taxation as between the Federal Government and the various States, and the same can be readily administered with less conflict than a tax based upon the shares' " (House Rep. #922, Committee on Ways and Means, 64th Cong., 1st Sess., p. 5; C. B. 1939-1, Pt. 2, p. 25).
>
> (See also 53 Cong. Rec. 10596 and app. 1495.)

The Chairman of the House Committee expressed the same thought (53 Cong. Rec. app. 1942):

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* "It was decided therefore that a moderate estate tax, with a rate not to exceed a maximum of ten per cent., when supplemented by the collateral rates imposed by the states, would really make a somewhat logical inheritance tax structure at that time, and I think it did" (Proceedings of Conference, p. 105).

Mr. Blakey had noted in 1916 the diminished opposition to the *estate* tax on the part of the States. "The New Revenue Act," 6 Amer. Ec. Rev. 844.

"Mr. Cox: Does the gentleman recall how his tax rates compare with the inheritance tax rates in the State of New York?

Mr. Kitchen: No; I do not know. We levy an entirely different system of inheritance taxes. We levy the tax on the transfer of the flat or whole net estate. We do not follow the beneficiaries and see how much this one gets and that one gets, and what rate should be levied on lineal and what on collateral relations, but we simply levy on the net estate. This also prevents the Federal Government, through the Treasury Department, going into the courts contesting and construing wills and statutes of distribution."*

The estate tax is simple and economical to administer, but that observation was hardly the entire point of Mr. Kitchen's remarks (*cf.* R. 76).

The opposition expressed in behalf of the States, to which petitioner makes full reference (pp. 29-30), could hardly have been forestalled, by proposing a tax which would merely be a more easily administered tax. The Committee reports advance this consideration as an *additional* reason why the federal tax should be adopted as an estate tax.

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* Mr. Dixon, another Committee member, also voiced the conception that no conflict could arise (53 Cong. Rec. 10596):

"To-day there are 42 States imposing taxes upon inheritance, 30 of them provide for taxes upon both direct and collateral heirs; 12 limit the taxes to collateral heirs. This bill provides for a tax upon the transfer of the net estate rather than upon the shares passing to heirs and distributees, devisees, and legatees. Its administrative features are simple. I appreciate the argument that this tax might properly be left entirely to the States and have some sympathy with that proposition, but with its large exemption, of $50,000 and its reasonable rates there will be little reason to complain of this law."

Prof. Schultz has made the same point with respect to the Federal exemption (Inheritance Taxation, p. 337).

We do not find in the Record "the discussions on the floor" which it is claimed "abundantly" demonstrate that the difficulties of administering a federal share tax were "in fact the fundamental reason for proposing an estate tax" (pet. br. p. 31). The Committee report quoted was written in 1933.

Confirmation of the Congressional intention as to the incidence of its tax will also be found in the draft of the bill as originally introduced and in the text as finally adopted.

The Original Draft of the Federal Estate Tax.

The bill as first introduced made no express provision for adjusting the incidence of the tax. But that omission could be supplied "in the revealing light of the forms that were rejected" (*Hopkins Savings Ass'n* v. *Cleary*, 296 U. S. 315, 334).

Every previous federal death tax had made provision for the payment of the tax by the legatees and had afforded means by which the executor might have reimbursement for the tax from the legatees (30 Stat. 448, 464-6 (June 1898) as amended 31 Stat. 946 at 949 (1901); 13 Stat. 223, 285-7, 287-9 (July 1864); 12 Stat. 432, 485-6 (July 1862); 1 Stat. 527 (1797)). The bills for a federal share tax which had been offered in 1909 and 1913 also contained such provisions (44 Cong. Rec. 4279; 50 Cong. Rec. 4422 *et seq.*).

So far as its administrative provisions were concerned (secs. 205 *et seq.* of the 1916 Act), the proposed estate tax law closely paralleled both the provisions and the structure of the earlier federal death tax laws:—the return; the ascertainment of the amount of the tax; its payment and the receipt therefor to the executor, conclusive as to the fact of payment in any judicial proceeding;—down to and including the clause authorizing the Collector to obtain the tax from any person having any property of the estate. But

where each of the earlier Acts *then* made specific provision placing the incidence of the tax upon the legatees (*i.e.*, 31 Stat. at 949), the proposed estate tax was silent.

The proposed federal tax also reflected careful study of the English law—but did not follow that law insofar as it explicitly apportioned the estate tax attributable to property not passing to the executor (Finance Act of 1894, 57 & 58 Vict. c. 30 §§6(2), 9(4) and 14(1). The Senate document which was at hand (see Appendix 3) explained, and the authorities interpreting the English law confirm, that the incidence of the English estate tax, when not expressly apportioned, falls upon the residuary estate (*In re Bourne*, (1893) 1 Ch. 188; *In re Avery*, (1913) 1 Ch. 208).

Constitutional considerations. The background of constitutional doctrine is also relevant. When the estate tax was adopted in 1916 its permissible incidence was firmly fixed by the decision in *Knowlton* v. *Moore*, 178 U. S. 41, in which this Court had warned against a death tax measured by the entire estate and imposed upon the legacies or distributive shares. "It may be doubted," wrote Mr. Justice White:

> "aside from express constitutional restrictions, whether the taxation by Congress of the property of one person, accompanied with an arbitrary provision that the rate of tax shall be fixed with reference to the sum of the property of another, thus bringing about the profound inequality which we have noticed, would not transcend the limitations arising from those fundamental conceptions of free government which underlie all constitutional systems" (p. 77; and see also p. 109).

(See also *Matter of Sherman*, 179 App. Div. 497, 500 aff'd 222 N. Y. 540; *Newton's Estate*, 74 Pa. Super. Ct. 361 at 370).

It is clear why Congress, in the face of this ruling, should have desired that its estate tax should not fall upon the legatees.*

Indeed the constitutionality of the estate tax was soon after sustained, against the challenge based upon *Knowlton* v. *Moore*, because it does not fall upon the shares (*New York Trust Co.* v. *Eisner*, 263 Fed. 620 at 621 *per* Judge Mack, aff'd 256 U. S. 345):

> "The doubt as to validity expressed in that case * * * did not extend to the power of Congress expressly to impose an estate tax rather than a legacy tax,—to measure it by the value of the net estate and to cast the burden upon the residuary personal estate."

Nevertheless question as to the incidence of the tax was raised in the House. A comparison was made with the provisions of the preceding death tax, the legacy tax of 1898 (30 Stat. at 464-6, secs. 30 *et seq.* as amended in 1901, 31 Stat. 946 at 949). In that law, it was pointed out, there was a provision that any tax paid "shall be deducted from the particular legacy or distributive share on account of which

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* *Matter of Hamlin*, 226 N. Y. 407 at 413:

> "In 1916, when the Congress was again confronted with the necessity of providing revenue, we may assume that the framers of a proposed law would in the first instance recall the law of 1898, and the decision of the United States Supreme Court in the *Knowlton* Case, to the end that any proposed legislation should be within constitutional limitations and consonant with the decision of the court."

Probably this constitutional doctrine of *Knowlton* v. *Moore* is not now law (*Stebbins* v. *Riley*, 268 U. S. 137; *Matter of Vanderbilt*, 251 N. Y. 297 at 315, aff'd sub. nom.; *Whitney* v. *State Tax Commission*, 309 U. S. 530 at 540). But "it is quite inadmissible to assume that the Congress exerting Federal power was legislating in disregard of existing doctrine" (*Burnet* v. *Brooks*, 288 U. S. 378 at 389).

the same is charged". The proposed estate tax was criticized in that it failed to make similar provision.*

But the Senate inserted the appropriate provision at the point indicated (53 Cong. Rec. 13299, accepted by the House at 14112). Its purpose is clearly to state the intention to fix the incidence of the tax upon the estate (Revenue Act of 1916, sec. 208; now I. R. C. sec. 826-b). Indeed the amendment employs the words of Mr. Hull that the tax be paid "out of the estate before its distribution" (p. 14, *supra*)—words which were in turn borrowed from the earlier Senate research document describing the incidence of the English estate tax which is not apportioned among the legatees (Appendix 3).

Internal Revenue Code Sec. 826-b.

The section follows immediately the authorization to the Collector to collect the tax from any possible source (sec. 826-a). It reads:

> "Sec. 826-b. *Reimbursement out of estate.* If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such,

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* "If he (the executor) pays the tax no provision is made for a charge against the beneficiaries. How is he to settle the rights between numerous beneficiaries where the tax is increased in proportion to the value of the estate?

* * * * *

"It seems to me that the framers of this bill have overlooked all the congressional acts heretofore passed imposing a tax upon the right of succession to property and have overlooked the fact that the tax must rest against the legatee or heir who received the distributive share of the estate. The tax not being levied on the succession to property of the decedent but on the property itself becomes a direct tax etc. * * *" (Rep. Dillon 53 Cong. Rec. App. 1495-6.)

such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this sub-chapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution."

If the Collector procures the tax out of property of the estate held by any legatee, that legatee is entitled to reimbursement from the estate. This alone discloses the Congressional intent, for the direction is for "reimbursement" and not "contribution"—a distinction of which, the statute itself shows, the draftsmen were quite aware. And the provision commands reimbursement if the legatee pay "any part" of the tax—whether that be more or less than what might be deemed his *pro rata*.

The succeeding clause, contemplating "contribution" from those persons whose interest "would have been reduced if the tax had been paid before the distribution of the estate" or "is subject to equal or prior liability", does not disturb the sense of the foregoing direction. The persons described are the ones who share the residuary estate. The provision contemplates that the tax shall fall upon them as do "other charges against the estate"—and such charges were not known to fall elsewhere than on the residuary estate. It predicates that "a prior liability" for the tax may exist; and if the tax were apportioned there could not be any such prior liability. The different State courts have concluded upon careful analysis that this clause reinforces and does

not disturb the preceding direction intended to place the burden of the tax upon the estate when the tax should happen first to fall upon the shares. (*Matter of Hamlin*, 226 N. Y. 407; *Farmers' L. & T. Co.* v. *Winthrop*, 238 N. Y. 488 at 495; *Newton's Estate*, 74 Pa. Super. Ct. 361 at 367 *et seq.*; *People* v. *Pasfield*, 284 Ill. 450 at 453-4.)

The final clause, the declaration of the intent of Congress that (unless the testator otherwise direct) the tax should be paid "out of the estate before its distribution," itself seems conclusive. It is the very language of Mr. Hull explaining the incidence of the tax, its real nature as he designed it. (p. 14 *et seq.*, *supra;* see also Holmes, *J.* in *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349-50).

The testator is permitted to direct "otherwise". No one will deny—and even petitioner assumes (br., p. 51, Point IV heading)—that the choice thus offered the testator is whether the tax should be apportioned among his beneficiaries and not merely whether payment of the tax is to be postponed.

The executor must pay the tax under any system of death taxation (*i.e.*, 30 Stat. 448, 465; or former N. Y. Tax Law §224).; a direction merely to pay the tax before distributing would be an idle caution. This provision has the different purpose of declaring that the tax is not to be distributed among the shares. In the same sense a share tax is payable *after* the estate is "distributed" among the beneficiaries. (And compare the proposed new sec. 826-d—Appendix 7.)

Petitioner's analysis of the provision leads him nevertheless to the conclusion that "the burden of the tax is left to be distributed pursuant to applicable state law" (br., p. 37). Even the dissenting opinion in the Court below recognized in this provision "the command of the federal estate tax that, unless otherwise directed by the will, the tax be paid out of the net estate * * *" (R. 76 and 79). Con-

temporary interpretation by the Treasury went even further and fully agreed with our analysis.*

It is argued that section 826-b if so read is meaningless where there is no residuary estate or where under State law the tax falls upon the residuary personalty rather than upon the residuary realty (pet. br., pp. 36-7; R. 78). The contention depends upon an erroneous presupposition already criticized: the primary purpose of Congress was to prevent its tax from falling upon the shares; and Congress intended the tax to fall upon the residue only in the sense in which any inevitable consequence is intended (pp. 10-11, *supra*). Congress seems indeed to have recognized that not all testators leave residuary estates—that is why it provided in 826-b that the tax should fall upon the estate "so far as is practicable".

On the evidence the conclusion must be that Congress, far from being indifferent as to the incidence of its estate tax, conclusively fixed its incidence. And the subsequent legislative history of the estate tax law considered *infra*, confirms that conclusion (see pp. 33-34, *infra*).

Internal Revenue Code Sec. 812-d.

Petitioner maintains that a different Congressional intention was established in 1924 by an amendment of the

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* Reg. 37, Art. XXXVII, revised May 1917:

"The provision in the last sentence of section 208 (now I. R. C. secs. 826-a and 826-b) merely recognizes the essential fact that this is not an inheritance, but an estate tax. It is levied upon the whole net estate and is payable therefrom by the executor before distribution to and without regard to its effect on the several inheritors. In the event, therefore, that in the collection of the tax the Government has proceeded against that part of the estate which has come into the possession of an individual beneficiary, the law provides an adjustment of the tax among the several beneficiaries in such a manner as to restore the condition that would have existed had the tax been paid when due as a tax upon, and payable out of, the whole net estate." (Matter in parentheses ours.)

law which limited the extent of the deduction for charitable bequests (I. R. C. sec. 812-d).

Two different problems concerning deductions for charities provoked that amendment. Neither had anything to do with the question of the power of the States to alter the incidence of the federal estate tax. The first involved State legacy taxes. The Courts had held that the face amount of a general bequest to charity was deductible in computing the federal net estate even though the charity paid a State tax (*Union & New Haven Trust Co.* v. *Eaton*, 20 F. (2d) 419; *Estate of Amy Lowell*, 20 B. T. A. 440 and cases cited; *Matter of Colonial Trust Co.*, 19 B. T. A. 174). The second involved the federal estate tax. On February 18, 1924, this Court had permitted a deduction for the entire residuary gift to charity without requiring that allowance be made for the federal taxes which heavily reduced the bequest (*Edwards* v. *Slocum*, 264 U. S. 613. The problem arose only where the *residuary* bequest was to charity, since the federal tax fell only upon the residuary estate.

Congress promptly wrote the opposite rule into the law (Revenue Act of 1924, sec. 303 (b) (3). Plainly the setting did not imply a "recognition" that the federal tax might fall, by State command or otherwise, elsewhere than upon the residuary estate. Congress had only one purpose: to limit the deduction allowed for charity to the amount actually received by charity.

The contemporary Committee reports (see Appendix 4) will be searched in vain for suggestion of a recognition of or acquiescence in the power of any State with respect to the incidence of the federal tax; or to adopt the dictum by Judge Hough in the opinion below in *Edwards* v. *Slocum;* or to recognize what Mr. Solicitor General James M. Beck in that case thought it unnecessary to dispute for purposes of his argument.* At most Congress could not in this setting be

* The Committee report to which petitioner refers was made in 1932 (pp. 45-6).

deemed to have recognized any fact other than its own dominating purpose to require allowance to be made in computing the charitable deduction for taxes of *whatever* nature levied, and by *whatever* authority.

The amendment itself would meet the situation which gave rise to it, first, by excluding the State legacy taxes from the deduction allowed for any general bequest to charity, and second, by making similar provision for the federal estate tax as well where the charitable bequest is in the residue.

Consequently whether, as petitioner argues (br. p. 44) the amendment "recognized in express terms" any power in the States to dictate the incidence of the federal tax depends first of all upon how its words are parsed. Canons of grammatical construction do not determine whether its phrase: "by the law of the jurisdiction under which the estate is administered" in truth refers to "the tax imposed by section 810," or simply to the different taxes which the States may impose ("estate, succession, legacy, or inheritance taxes"). But it ought to be significant that the provision is found in most death tax laws, including the New York law (Tax Law, sec. 249-s(3)), and in that setting it does not imply a recognition of the competency of "the law of the jurisdiction under which the estate is administered" to change the incidence of the New York tax. The elaborate analyses in the tax services of this provision of the federal law do not intimate the purpose now claimed for it. (C. C. H. Federal Tax Service 1942, Vol. 3, Pars. 23, 401-23, 407; Alexander Tax Service, Vol. 1, Par. 4108.)

The provision, now sec. 812-d, was not adopted until 1924. In 1926 it was retroactively repealed (Revenue Act of 1926, sec. 323), and it did not again find its place in the law until 1932 (45 Stat. 282; I. R. C. 303(a) (3), 303(b) (3)). Petitioner's argument is in effect that it repealed sec. 826-b by implication, or rather by "recognition".

The Authorities.

Its circumstances, as well as the facts we have reviewed, explain the unreliability of Judge Hough's dictum that Congress was indifferent as to the incidence of its estate tax and left the "state courts" to settle it as they pleased (*Edwards* v. *Slocum*, 287 Fed. 651, 653, aff'd 264 U. S. 61).

No person who had an interest in the question of apportionment was before Judge Hough: none of the legatees were parties—only the executor and the Collector. The question was not suggested, much less argued, in the briefs submitted to Judge Hough. There was no examination by anyone of the evidence on the intent of Congress. Nor was the dictum uttered after consideration, it was merely assumed *arguendo*, in order to establish a different point. Both in the opinion below by Judge Augustus Hand, and in the opinion of Mr. Justice Holmes, the same holding was reached without reliance on this ground.

It is true that the dictum has had currency. The New York State Commission responsible for sec. 124 relied upon it; its influence is apparent in a Treasury regulation of 1925 and a Senate report in 1932 (pet. br., pp. 45-6); and a number of the State Courts have adopted its thought (pet. br., p. 47). They are however only by way of dicta: there is apparently no decision which apportions the federal tax among all legatees under a will.

These dicta cannot survive contrast with the opinions, particularly in New York and Massachusetts, which hold that the federal estate tax is not to be apportioned. These opinions do not rely merely upon the mechanical incidence of *any* estate tax, they reflect painstaking study of the evidence as to the intent of Congress and their conclusion rests upon a finding as to Congressional intent.

Perhaps the most emphatic of them was written by Judge Cardozo in *Matter of Oakes*, 248 N. Y. 280. He there ob-

served that "The Federal tax * * * is laid upon the transfer of the estate as a whole, and, primarily at least*, is a charge upon the residue". Then this was reenforced by this reference to sec. 826(b):

> "The command of the statute is explicit as to the incidence of the burden (the opinion quoted sec. 826-b). The incidence of the burden, thus fixed by the statute in terms so unmistakable, has not been modified by the will * * *." (p. 283).

An elaborate analysis of the Act and the intention of Congress will be found in *Matter of Hamlin*, 226 N. Y. 407, cert. den. 250 U. S. 672; *cf. Winthrop v. Farmers' Loan and Trust Company*, 238 N. Y. 488, cert. den. 266 U. S. 633. (see also *Plunkett v. Old Colony Trust Company*, 233 Mass. 471; *Bemis* v. *Converse*, 246 Mass. 131; *In re Newton's Estate*, 74 Pa. Super. Ct. 361; and *People* v. *Passfield*, 284 Ill. 450).

These decisions presuppose that the meaning of this federal law is a federal question, not amenable to diverse answer by the different States. They acknowledge a federal command which they are bound to follow (p. 5, *supra*). Petitioner incorrectly suggests (p. 47) that they "appear to have been decided on reasoning unnecessary for the decision", or that their correctness may somehow be explained by the date of death of the decedent.

The observation of Mr. Justice Taft in *Y. M. C. A.* v. *Davis*, 264 U. S. 47, at page 50, does not go so far as is claimed. The law does not exempt any specific $50,000 from the tax; his very point was that the tax does not fall upon the interest of any particular legatee. The decision holds that the tax must be borne by the residue and not by the shares and

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* *i.e.*, in the absence of contrary direction in the will and not, as suggested in the dissenting opinion below (R. 78), in the absence of State regulation.

in the course of his opinion Mr. Justice Taft made reference to sec. 826(b) (p. 50).

Section 826-b Today.

We face the seeming paradox involved in invalidating Decedent Estate Law sec. 124. Congress desired to avoid conflict with the States (and acted moreover in the light of State taxing systems, many of which have changed). Yet the expression of that purpose leads to rejection of the present State statute. The obvious answer would seem to be that Congress if and when it should find itself in agreement with the New York strictures on the equities of its existing command as to the incidence of its tax (but compare pp. 33-35, *infra*), is thereupon free to revoke that command.

But there are other answers. The provision directing the tax upon the estate rather than the shares still serves a necessary federal purpose: it preserves for the perhaps immediate future a source of federal revenue—the legacy tax. In 1935 Congress came near to adopting such a legacy tax in addition to the estate tax. The proposal was urgently made by the President and was adopted by the House, but was eliminated in conference committee (H. R. #1681, 74 Cong., 1st Sess., p. 2—Cum. Bull. 1939-1, Pt. 2, pp. 643, 648; Conf. Rep. #1885, p. 10, amd't #17—Cum. Bull. 1939-1, Pt. 2, p. 663; see also the testimony by the then Attorney General, Mr. Justice Jackson, reprinted in Studenski, Taxation and Public Policy, pp. 212 *et seq.*, 221). Present needs suggest its revival. Many sovereignties levy both such death taxes and economic theory justifies the simultaneous imposition of both (pp. 12-13, *supra*).

It is of the essence—in an intensely practical way—that the one should fall upon the estate without distribution and that the other should fall only upon the legatees. The proposed rates, for example, quickly mounted to 50%, and

reached a maximum of 75%. If the States will have successfully converted the federal estate tax (which may also exceed 50%) into a tax necessarily at the same high rate on the legacies, the combined taxes may exceed the legacies—a result which cannot follow under a federally designed system which must afford appropriate credit against the legacy tax.

It is no answer to suppose that the State apportionment laws would be superseded by such federal legislation. The existence of such State laws would itself be an effective practical impediment to the adoption of a federal legacy tax superimposed upon the estate tax.

The proposal has also been made, and is familiar, that the national government levy all estate and all share taxes and divide the proceeds with the States. Mr. Hull said he had it in mind when he drew the original law (p. 15, *supra*). But here too the field would not be open for Congressional action if the States have succeeded in changing the incidence of the federal tax. Such a comprehensive federal scheme would not be feasible in the light of such interference.

It is in any event a dangerous proposition that the States should be free to override the dictated incidence of a federal tax because the Congressional purpose in fixing that incidence may at a later time appear questionable. But it so happens that sec. 826-b also serves the wider purpose of preserving the freedom of federal action—a fortunate circumstance in the light of present day realities.

The Result of Section 826-b.

Since Congress adopted sec. 826-b to express the underlying purpose that its estate tax should not fall upon the shares, it follows that New York Decedent Estate Law, sec. 124 which seeks to accomplish that result is invalid. The whole point of *Hines* v. *Davidowitz*, 312 U. S. 52 and many

other authorities under the Supremacy Clause, is that it is not necessary that Congress declare in express terms its purpose to exclude action by the States, but that its purpose, gathered upon examination of the evidence, will govern.

The dissenting opinion in the Court of Appeals concedes that sec. 826-b constitutes a "command" that "the tax be paid out of the net estate" (R. 76, 79), but argues that New York may place the tax elsewhere because Congress was nevertheless indifferent as to the incidence of the tax. Granting the error of fact, we should have supposed that it was unnecessary for Congress, in stating what it did desire, to state specifically that it did not desire State legislation to the contrary. There is no principle denying federal supremacy unless Congress expressly exclude the States from the field (compare *Baltimore & Ohio R. Co.* v. *Kepner,* 314 U. S. 44; *Flaherty* v. *Hanson,* 215 U. S. 515; *Western Union Tel. Co.* v. *Boegli,* 251 U. S. 315; *N. Y. Central R. R. Co.* v. *Winfield,* 244 U. S. 147; *Cloverleaf Butter Co.* v. *Patterson,* 315 U. S. 148; and cases cited, p. 37, *infra*).

It should be noted that the petitioner seems to prefer to stand on the different and extreme ground that sec. 826-b actually authorizes the burden of its tax to be distributed pursuant to State law.

However, we shall consider this case upon an assumption like Judge Desmond's as to the purpose and meaning of section 826-b (Point III, *infra*).

POINT II.

New York Decedent Estate Law sec. 124 is in conflict with the Federal Estate Tax.

In one situation the effect of apportioning the federal tax as required by Decedent Estate Law sec. 124 is sub-

stantially to reduce the amount of the federal estate tax otherwise payable.

The federal law limits the deduction from the gross estate for charitable bequests to the amount actually received by the charity (see pp. 24-26, *supra*). Where a charity is the residuary legatee, the result of apportioning the federal tax under sec. 124 is to enhance the residuary estate. This increases the charitable deduction, and reduces the net taxable estate and so the ensuing federal tax (*cf. Commissioner* v. *Thompson*, 123 F. (2d) 816 at 818).

This collision is by no means *de minimis*. In a New York estate of $1,000,000 where the residue is left to charity after general legacies of $500,000, if the federal tax falls normally upon the residue the federal government will receive $181,538. If the tax is apportioned under sec. 124, the tax payable is $147,218—a decrease of approximately 19%. If the net estate is $5,000,000, of which half is left in general bequests to individuals and the residue to charity, the federal tax upon the estate under sec. 826-b is $1,793,630. Apportion the tax and the federal return is $1,153,612—a difference of $640,000, approximately 35%.

The percentage of difference is even more appreciable on larger estates, as the rate reaches the higher brackets.

Upon these facts, *United States* v. *Snyder*, 149 U. S. 210, and *Flaherty* v. *Hanson*, 215 U. S. 515, are ample authority for rejecting sec. 124.

Petitioner claims that the federal statute, sec. 812-d, "itself directs" that allowance be made for "the burden of the tax as determined by state law" (p. 15 footnote, see also p. 46). Petitioner did not make so wide a claim when examining the exact words of the statute; then it was argued only that it "recognized" the controlling effect of State law.

We have discussed the statute (pp. 24-26, *supra*): it carries no implication, much less any authorization, as to the State power to adjust the incidence of the federal tax.

Its aim was to put an end to a method of avoiding the estate tax, to augment rather than diminish the federal revenue from the tax. In the light of its flickering existence before 1932 (p. 26, *supra*), it could have afforded singularly intermittent direction opening the field for State action. A more positive declaration of the alleged Congressional intent to authorize such substantial reduction in the federal revenue would seem appropriate.

POINT III.

Congress by legislative action, subsequent to sec. 826-b, preempted the field which in any event is not open to the States without Congressional consent.

We shall here assume that Congress did not in sec. 826-b declare its intention to adopt an estate tax, the burden of which is not to be distributed as a legacy tax is distributed. Still there has since 1916 been significant Congressional action, overlooked in the dissenting opinion below. There has been intermittent pressure upon Congress, upon alleged equitable considerations, to direct apportionment of the tax. Congress has yielded to that pressure to a limited extent but it has declined to do so to the extent dictated by Decedent Estate Law sec. 124.

Congressional action after 1916. The first occasion arose in 1918. The Senate voted to substitute an inheritance or legacy tax for the estate tax. The report of the Senate Finance Committee urged the change on the ground that the incidence of the estate tax was inequitable (Sen. Rep. 617, p. 15, 65th Cong., 3rd Sess.; Cum. Bull. 1939-1, Pt. 2, p. 127). Contemporary evidence confirms the Senate's preoccupation with the equities of the incidence of the estate tax (see Appendix 6). The proposal failed in Conference (H. R. 1037, pp. 171-3; Cum. Bull. 1939-1, Pt. 2, p. 151). But the different House proposal (described by the House

Committee as one of those "insuring more *equitable*, uniform and efficient administration of the law") was adopted. It directs that the tax be apportioned to the beneficiaries in so far as attributable to the proceeds of insurance paid to those beneficiaries (H. R. 767, p. 22 *et seq;* Cum. Bull. 1939-1, p. 102). It is now sec. 826-c of the estate tax law (see Appendix 1). It provides a scheme of reimbursement among beneficiaries directly contrary to sec. 826-b. As Chief Justice Rugg said in *Bemis* v. *Converse*, 246 Mass. 131 at 134, "the presence of this provision indicates that no further apportionment was intended by Congress".

In 1921 the demand for substitution of a legacy tax was renewed but was again unsuccessful (61 Cong. Rec. 6922, 5839-40).

Again in 1924 an effort to substitute a legacy tax was made—this time on the floor of the Senate (65 Cong. Rec. 8034 *et seq.*, 8037). One of the reasons stated for the proposed substitution was, again, that the incidence of the federal estate tax upon the residuary was unfair (65 Cong. Rec. 8039, Senator Walsh of Massachusetts). The Senate adopted the proposal, but in conference the House views prevailed (65 Cong. Rec. 9536; Cum. Bull. 1939-1, Pt. 2, p. 308, amdt. 122).

There was further action in Congress following the decision of the Court of Appeals in the present case. Mr. Randolph Paul, then Tax Adviser to the Secretary of the Treasury, officially proposed that Congress devise its own formula of apportionment (Statement to the House Ways and Means Committee, Wall Street Journal, March 5, 1942, p. 16, column 4). Another proposal, in the House, was to authorize the States to apportion the tax (H. R. 6257). But neither suggestion has been adopted.

The pending Revenue Bill proposes only the apportionment of the tax attributable to property passing under a power of appointment (proposed Revenue Act of 1942, sec.

403, adding new I. R. C. sec. 826-d). Its text, as well as the House Committee report, is in Appendix 7. Again, the stated motive was to achieve "fair and equitable" apportionment of the tax burden. At the present writing the proposal has been endorsed by the Senate Committee and is before the Senate for consideration. Whatever the outcome, this much seems clear: on several occasions since adoption of the estate tax Congress has been urged on equitable grounds to reconsider the incidence of the tax, has taken the question under consideration, and has declined to shift its incidence from the estate itself except in two narrow instances. And those exceptions, involving the tax on insurance and on property subject to a power, are the situations in which the property is deemed part of the testator's estate only by an artificial concept.

In these circumstances the decisions of this Court establish that there is no room for State action: that even if the incidence of its tax were not originally one exclusively for the concern of Congress, Congress has in fact occupied the field. In any event the States are not free unless with Congressional consent to enact supplementary (much less contradictory or interfering) legislation in this field.

Congress is in the field. The governing principle was stated many years ago in *Prigg* v. *Pennsylvania*, 16 Pet. 539, where there was involved the constitutionality of a Pennsylvania law governing the recapture of fugitive slaves. There was (as we also assume here) no actual conflict with the federal legislation on the same subject. Mr. Justice Story observed, however, that the federal act "may truly be said to cover the whole ground * * * not because it exhausts the remedies which may be applied by Congress * * * but because it points out fully all the modes of obtaining those objects, which Congress in their discretion have

as yet deemed expedient or proper to meet the exigencies of the Constitution * * *" He continued:

> "For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State legislatures have a right to interfere, and, as it were, by way of complement to the legislation of Congress, to prescribe additional regulations, and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress, in what it does prescribe, manifestly indicates that it does not intend that there shall be any farther legislation to act upon the subject matter. Its silence as to what it does not do is as expressive of what its intention is as the direct provisions made by it * * * the will of Congress upon the whole subject is as clearly established by what it had not declared, as by what it has expressed" (pp. 617-8).

The recent decision in *Hines* v. *Davidowitz*, 312 U. S. 52, applies the principle in circumstances peculiarly apposite here. The decision moreover corroborates this general presumption through examination of the available evidence as to the intention of Congress.

The question was whether the Federal Alien Registration law superseded the Pennsylvania statute which set up a system of registering aliens which required them to carry identification cards to be produced upon demand. The field was one, it was pointed out, in which concurrent State power if it exists is narrowly restricted, especially where Congress had enacted an integrated system apparently covering the field. Congress had in the past consistently declined to adopt an alien registration law which made provision for the carrying of identification cards, and this Court con-

cluded upon the evidence that Congress had intended that there should be no such legislation which so invaded personal liberties. It was not necessary for Congress to have excluded the States from the field by express words. The States were not free to act where Congress had deliberately avoided acting:

> "* * * the States cannot, inconsistently with the purpose of Congress, conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations" (pp. 66-7).

Many decisions under the commerce clause carry the same point: given the fact that in 1916 Congress stated its intention as to the incidence of its tax and in subsequent years made some adjustments in the incidence of the tax while at the same time refusing completely to reverse the incidence,—they would draw the conclusion that the States are ousted from the field.* But it is not necessary to rely upon those decisions, which turn upon preconceptions supporting State action in the field which are inapplicable here (*cf. Atchison Ry.* v. *Railroad Comm.*, 283 U. S. 380, 392-3). In the present case there is involved, in the federal estate tax, a comprehensive and integrated federal system,

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* *Nor. Pac. Ry.* v. *Washington*, 222 U. S. 370; *N. Y. Central R. R. Co.* v. *Winfield*, 244 U. S. 147; *Oregon-Washington Co.* v. *Washington*, 270 U. S. 87; *Missouri Pacific* v. *Porter*, 273 U. S. 341; *Adams Express Co.* v. *Croninger*, 226 U. S. 491; *Napier* v. *Atlantic Coast Line*, 272 U. S. 605; *Postal Tel. Cable Co.* v. *Warren-Godwin*, 251 U. S. 27; *Kansas City So. Ry.* v. *Van Zant*, 260 U. S. 459; *cf. New Orleans N. E. R. R. Co.* v. *Harris*, 247 U. S. 367; *C. & O. Co.* v. *Stapleton*, 279 U. S. 587; *Mich. Cent. R. R.* v. *Vreeland*, 227 U. S. 59. These decisions are *a fortiori*, since where invasion by a state of the federal commerce power is claimed, the principle applied if the commerce is of local concern only is that Congress must affirmatively be shown to have occupied the field (see p. 39, *infra*).

a complete scheme of regulation, and the States may legislate upon any of its aspects only if Congress permits.

The federal estate tax is a complete and independent tax system. Every detail necessary to make the federal estate tax a complete and independent revenue system finds expression in the law:—the separate tax return; the independent determination of the property subject to tax and the value of that property; the independent mechanism for the levy, the enforcement, and the collection of the tax in the federal courts (I. R. C. secs. 821 *et seq.*); and, we submit, the provision fixing its incidence upon the estate except to the extent that Congress has seen fit to apportion it (sec. 826-b, 826-c, and the pending 826-d). It is nationwide in application and it functions fully without assistance from any of the States.

It would indeed be subject to State control if the State power to tax inheritance were "complete", which presumably means paramount (R. 80). But the estate tax rests upon independent federal power (*Knowlton* v. *Moore*, 178 U. S. at 56). It is "given in terms as absolute as language affords" (*United States* v. *Snyder*, 141 U. S. 210 at p. 214). One of the truisms of constitutional law is that the taxing powers of State and federal government are concurrent and mutually independent (The Federalist No. 32; Story, Commentaries on the Constitution (5th ed. 1905), vol. 2, sec. 1068; vol. 1, sec. 940; *Knowlton* v. *Moore*, 178 U. S. 41 at 60; *United States* v. *Bennett*, 232 U. S. 299 at 306). And where conflict with the State taxing power does arise, it is the federal power which is superior (*cf. United States* v. *Texas*, 314 U. S. 480; *Frick* v. *Pennsylvania*, 268 U. S. 473 at 479; *Lane County* v. *Oregon*, 7 Wall. 71).

The authorities closely limit the power of the States with respect to such a system created under such a power. There must be distinguished the approach to questions of State

power to legislate concerning commerce which is only of local concern because peculiarly adapted to local regulation: necessarily considerations of national uniformity do not enter in such case. Federal and State power are then "concurrent," and the States may act until Congress moves affirmatively to occupy the field (*Cooley* v. *Board of Wardens*, 12 How. 299 at 319-20; *The Minnesota Rate Cases*, 230 U. S. 352, 399; *California* v. *Thompson*, 313 U. S. 109, 113, 116). But the federal power to tax at death when exercised in a comprehensive and self sufficient system is inconsistent with action by the States, which may then act concurrently only when Congress consents.

Only Congressional permission will authorize the States to change the incidence of the federal tax. This principle in its relation to the federal revenue system was clearly stated in *Burnet* v. *Harmel*, 287 U. S. 103.

The question in the case was whether State law would be permitted to determine whether or not certain payments made to a taxpayer were income. This Court ruled (p. 110):

> "Here we are concerned only with the * * * exercise of its plenary power (of Congress) under the Constitution, to tax income. The exertion of that power is not subject to state control. It is the will of Congress which controls, and the expression of its will in legislation, in the absence of language evidencing a different purpose, is to be interpreted so as to give a uniform application to a nationwide scheme of taxation. * * * State law may control only when the federal taxing act, by express language or necessary implication, makes its own operation dependent upon state law."

These principles—the most recent formulations of them are even more emphatic (*United States* v. *Pelzer*, 312 U. S. 399, 402-3; *New York* v. *Feiring*, 313 U. S. 283, 285)—are applicable to the estate tax (*Lyeth* v. *Hoey*, 305 U. S. 188 at 193).

They would seem to deny to the States the power to change the incidence of this federal tax even if Congress had been entirely silent on that subject. Of course the inference to be drawn from the silence of Congress depends upon "the nature of the congressional power" in question (*Graves* v. *New York ex rel. O'Keefe*, 306 U. S. 466 at 479). But so far as the power underlying the estate tax or any integrated and comprehensive federal system is concerned, the principle which must be applicable is that the silence of Congress is not assent to State action. This must be so: for where Congress has established such a system, the States should be free, neither to interfere with nor to supplement its operation, without clear evidence that Congress intended to authorize such action.

The decisions involving other similarly constituted federal systems entirely support this generalization. In emphatic language stressing the necessity for congressional consent, the States have been consistently denied the power to regulate the operations of the federal banking system (*Farmers & Mechanics' Nat. Bank* v. *Dearing*, 91 U. S. 29, 34; *Easton* v. *Iowa*, 188 U. S. 220; *First Nat'l Bank* v. *California*, 262 N. Y. 366; *cf. Hopkins Savings Ass'n* v. *Cleary*, 296 U. S. 315). The opinions stress the need for preserving the nationwide uniformity of the system: the objection to State action is that it,

> "if permitted to be applicable, might impose limitation and restrictions as various and as numerous as the States" (*Easton* v. *Iowa*, at p. 229).

On the same grounds, local law—legislative or judicial—has been outlawed which affects the uniform and independent operation of the federal bankruptcy system (*International Shoe Co.* v. *Pinkus*, 278 U. S. 261 at 265; *Kalb* v. *Feuerstein*, 308 U. S. 433 at 439; *City of New York* v. *Feiring*, 313 U. S. 283; *Prudence Realization Corp.* v. *Geist*, 316 U. S. 85), or the federal judicial system (see Warren, Federal and State Court Interference, 43 Harv. L. Rev. 345; *cf. B. & O. R. Co.* v. *Kepner*, 314 U. S. 44 at 53-4), or the laws of Congress upon a federal proprietary interest.* As was recently said of a provision in the Bankruptcy Law: "nothing in the language * * * or its legislative history suggests that its incidence is to be controlled or varied by the particular characterization by local law or the State's demand" (*New York* v. *Feiring*, 313 U. S. 283, 285). It is clear that State legislation may neither vary nor supplement the operation of a federal system established under an independent federal power, nor local judicial interpretation disrupt its uniform incidence, unless Congress assents or some "necessary implication" requires.

The necessity for uniformity. Particularly in the field of federal taxation is uniformity most earnestly commanded.**

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* *Ohio* v. *Thomas*, 173 U. S. 276 (manager of federal home for veterans not subject to State law against serving oleomargarine—*cf. Johnson* v. *Maryland*, 254 U. S. 51; *In re Leaken*, 137 Fed. 680); *Hunt* v. *United States*, 278 U. S. 96 at 100; *Fort Leavenworth R. R. Co.* v. *Lowe*, 114 U. S. 525; *cf. Superior Bath Co.* v. *McCarroll*, 312 U. S. 76 (all concerning the supervision of federal reservations or preserves); *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94 at 101 and 103-4, cases cited, note 19 (other federal lands).

Similarly, State law cannot govern the terms upon which the federal government holds or enforces its claims (*United States* v. *Summerlin*, 310 U. S. 414 at 416).

** *United States* v. *Snyder*, 149 U. S. 210, 214:

"The provision (Const. Art. I, sec. 8) exacting uniformity throughout the United States itself imports a system of assessment and collection under the exclusive control of the general govern-

In *United States* v. *Childs*, 266 U. S. 304, for example, the State rates of interest were held inapplicable to overdue federal taxes *because* such a construction of the law "abridges or controls a federal statute by a local law or custom, and takes from it uniformity of operation," and

> "makes the rate of interest that of a particular locality, differing with the locality—in New York, as said by the Government, 6%, in the middle West 8% and on the Pacific coast 10%" (p. 309).

But if the States may apportion the estate tax, then each State will be free to impose its own notions of what is an equitable incidence for the tax. Even so general a statute as Decedent Estate Law sec. 124, which directs that the federal tax be "equitably prorated" raises many problems. In New York the practice is to present schedules of apportionment supported by testimony (*Matter of Rappaport*, 167 Misc. 164, 167; compare *Matter of McManamy*, 172 Misc. 392; *Matter of Harjes*, 170 Misc. 431; *Matter of Kaufman*, 170 Misc. 436, at 443, *et seq.*; *Matter of Cronise*, 167 Misc. 310). Each variation may affect the amount of the federal revenue (Point II, pp. 31-33, *supra*). Apportionment does enormously complicate the computation of the tax. Even without apportionment, algebraic formulae are necessary where the residue goes to charity (C. C. H. Inheritance Tax Service (7th ed.), par. 3531.75, pp. 2552-2560). Mathematical skill of a high order is called for when in addition the tax is apportioned. And complex questions in reimbursement and contribution will arise especially if some of the apportioned shares of the tax should prove uncollectible.

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ment. And both the grant of the power and its limitation are wholly inconsistent with the proposition that the States can by legislation interfere * * *"

It is of no less importance that apportionment of the tax by the States is also inappropriate because national considerations are involved which transcend State lines. Administration of an estate may become necessary in several States. Unless all of them apportion the federal tax, and in the identical manner, the situation is confused. Only the State in which particular property happens to lie, determines its succession; that State may but is not required to bow to the law of the domicile if that is a different State (3 Beale, Conflict of Laws, secs. 465.1, 466.1; Vol. 2, secs. 245.1, 249.1, 249.2, 303.2; Restatement of Conflict of Laws, sec. 306 comment *a.*; *Frick* v. *Pennsylvania*, 268 U. S. 473, 491). In such a situation it is presumptuous for the State of the testator's domicile to undertake to regulate the incidence of the tax levied by the United States with respect to property transferred under the laws of another and third sovereignty. It would also seem that the domiciliary State would have no jurisdiction to do so. Neither could it enforce its decree against non-residents succeeding to foreign property. In respect of its incidence, the federal estate tax would no longer be "a fair and workable tax system" (*Helvering* v. *Hallock*, 309 U. S. 106, at 118, *cf. First Nat. Bank* v. *California*, 262 U. S. 366, at 370).

Neither is the State power appropriate in its application to the class of persons who naturally make their wills without relation to the State which would apportion the tax: the testator whose domicile is found to have been in a different State from that he intended; the testator who is found to have two domiciles; or the testator who changes his domicile without changing his will.

There is a true analogy under the Commerce Clause. If the subject-matter is national in character, that is if it necessitates a general system of uniform regulation affecting all the States alike, the States are not free to legislate in the field unless Congress assents (*Townsend* v. *Yeomans*, 301

U. S. 441 at 455: *Gloucester Ferry Co.* v. *Pennsylvania,* 114 U. S. 196; *cf. So. Pac.* v. *Jensen,* 244 U. S. 205). The silence of Congress means that State action in the field is forbidden (Biklé, The Silence of Congress, 41 Harv. L. Rev. 200).

This Court has recently declined to reverse the "historical national policy of federal non-interference with the taxing power of the States" (*Arkansas Comm'n* v. *Thompson,* 313 U. S. 132 at p. 145). That policy works both ways. The rationale of *Tarble's* case, 13 Wall. 397, in which a State was denied power to issue *habeas corpus* to question a detention under color of federal right, ought to be acceptable here (pp. 406-8):

> "There are within the territorial limits of each State two governments * * * independent of each other and supreme within their respective spheres. Each has its separate departments; each has its distinct laws; and each has its own tribunals for their enforcement. Neither government can intrude within the jurisdiction or authorize any interference therein by its judicial officers with the action of the other * * *. In their laws, and modes of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, and by what officers * * * are matters subject to their own control, and in the regulation of which neither can interfere with the other."

POINT IV.

Congress has power to fix the incidence of its tax and under the supremacy clause the States must yield.

Petitioner argues that if the federal estate tax law is in conflict with the Decedent Estate Law sec. 124, then the

conflict must be resolved in favor of the State law. If Congress did fix the incidence of the tax, the argument runs, such action would be "irrelevant to its power to levy and collect taxes" (p. 16) and "without reason" (p. 23).

This, it is clear, is a contention that the authority of Congress (Const. Art. I, sec. 8) to "lay" taxes does not embrace the authority to dictate where they shall fall—a contention which strikes at the very roots of political sovereignty. This contention would render unconstitutional the provisions of the federal law which apportion the burden of the tax where Congress has deemed it equitable to do so (I. R. C. sec. 826-c, and proposed sec. 826-d), and would foreclose Congress from adopting a formula of apportionment uniformly applicable throughout the nation (see p. 34, *supra*).

Assuming that it is legitimate to question the purpose of Congress in fixing the burden of its tax (*cf. United States* v. *Darby*, 312 U. S. 100 at 115), petitioner's challenge should not go without comment. Congress had sound basis for fixing the incidence upon the estate (p. 10 *et seq.*, *supra*). Its command serves today to keep intact a future source of federal revenue (p. 29, *supra*). If Congress should desire to break up the great accumulations of capital in residuary estates which are often left to charitable "foundations" as a means of perpetuating economic control, it would direct that its estate tax fall only upon the residue of estates (*cf. Sonzinsky* v. *United States*, 300 U. S. 506, 513).

The allied contention, only tentatively put forward (pet. br. pp. 21-4, 27-8), that Congress invades the exclusive field of the States by fixing the incidence of its own tax, is reminiscent of the original opposition to any federal death tax which was urged upon the same ground. But death taxes are "a usual subject of taxation" which inheres in "all governments under our constitutional system" (*Knowlton* v. *Moore*, 178 U. S. at 60, see also p. 56), and the power to levy a tax

must embrace the power to dictate who shall bear its burden (*cf. United States* v. *Darby*, 312 U. S. 100 at 124).

Every assertion of federal supremacy involves an invasion of one or another of the reserved powers of the States. The will of Congress would not be supreme if the States could overturn it upon the excuse of exercising their own powers. Many authorities in addition to those cited by the petitioner (p. 52) expound the power of a State over the distribution of assets at death. But the "most characteristic" of State powers may not be so employed as to overrule the Congressional intent or frustrate any federal system or purpose (*Burnes Nat'l Bank* v. *Duncan*, 265 U. S. 17 at 24; compare *Hines* v. *Lowrey*, 305 U. S. 85; *Kenney* v. *Supreme Lodge*, 252 U. S. 411)—even the allegedly exclusive powers over the distribution of assets at death (*Santovincenzo* v. *Egan*, 284 U. S. 40; *Childers* v. *Beaver*, 270 U. S. 555; *Nielsen* v. *Johnson*, 279 U. S. 47; T. R. Powell, Abolition of the Federal Inheritance Tax, printed in 67 Cong. Rec. 3797 (1926); cases cited in *Burnet* v. *Brooks*, 288 U. S. 378 at 401 *et seq.*). Petitioner's argument has force only if Congress acts unconstitutionally in seeking to dictate the incidence of its tax.

It is also repeatedly urged that the New York statute takes effect only *after* the tax is paid and so cannot conflict with the federal law. But this is sophistry. The now relevant portion of sec. 124 came into being because of the federal estate tax and is addressed only to that tax. As its history makes clear, its purpose is to overturn the incidence of the federal tax (pp. 2-4, *supra*). Like sec. 826-b, it treats of the single question of who it is who is ultimately to bear the weight of the federal tax. Moreover the federal law regulates the incidence of the tax if distribution of the estate should be made *before* the tax is paid (secs. 826-a, 826-b).

"Construction" and Presumptions as to Congressional Intent.

The "pertinent rule of construction" (pet. br. p. 48) does not require the Court to minimize the extent of the exercise of Congressional power for fear of colliding with any reserved power of the State. "Whenever the constitutional powers of the Federal government and those of the State come into conflict the latter must yield." (*Florida* v. *Mellon*, 273 U. S. 12, 17; compare *United States* v. *San Francisco*, 310 U. S. 16 at 30; see also *Oklahoma* v. *Atkinson Co.*, 313 U. S. 508 at 534-5). In *Western Union Tel. Co.* v. *Boegli*, 251 U. S. 315, 316, it was said of the contention that an act of Congress must be narrowly construed so as "to preserve the reserved power of the State over the subject in hand"—that it "is too conflicting and unsound to require further notice." A different rule of construction would itself flout the Supremacy Clause.

Other guides to "construction" are asserted (pet. br. p. 48). The decision of the Court of Appeals is indeed "absurd" and "unnecessary" if one begs the questions in this case—whether Congress was in truth indifferent, and whether New York may act in the absence of Congressional assent—and overlooks the effect of sec. 124 on the federal revenue. The decision is "harsh" if, again, one assumes that only the State formula of apportionment achieves justice.

The aid of certain presumptions is also sought (pet. br. pp. 51-2, brief *amici curiae* by Harrison Tweed and Weston Vernon, Jr., Esqs.). First there is the ruling of the Surrogate in New York presuming that the testatrix intended to incorporate sec. 124 in her will (R. 57). The facts do not support, but refute, any such view of her intention (p. 6, *supra*). In this Court it is argued, along this line, only that a testator *might* intend to incorporate the statute when he makes no express provision for the incidence of the tax (brief *amici curiae*, p. 5). And if the presumption does

not purport to find basis in the facts, then one might argue with equal force that, since under familiar principles the federal law is the law of the State (*Hines* v. *Lowrey*, 305 U. S. 85, 91), the testatrix intended to incorporate sec. 826-b. Indeed the facts go far to support this view (p. 6, *supra*). *Irving Trust Co.* v. *Day*, 314 U. S. 556 is obviously not to the contrary. It reads one of the provisions of New York law into a will, but in a situation where the State is competent to act "without restraint from the Federal Constitution" (p. 563).

The argument, without basis in the facts, must then proceed as a matter of law: that New York has exclusive power to dictate the manner of supplying omissions in the will of the testatrix. This is only a restatement of the position that upon the basis of reserved power the State power over the incidence of the tax is superior to the federal power pp. 45-46, *supra*).

The further version of this argument is more elaborate. It rests upon the fact that Congress permitted the testatrix to adjust the incidence of the federal tax. It is argued that Congress must be presumed to have opened the door to State control over her dispositions. But Congress intended its estate tax to fall without recourse to the beneficiaries; it has since so acted as to occupy the field fully; and in any event Congressional assent (unpresumed) is necessary to authorize the State to adjust much less to overturn the incidence of the tax. The unreality of the presumption is apparent: it seeks to overcome the grounds of the decision of the Court of Appeals by assuming their incorrectness rather than by facing them on their merits.

Upon this branch of the case, the decision in *Davis* v. *Elmira Savings Bank*, 161 U. S. 275, is the last—and ultimate—word. It was claimed in that case that a statute of New York establishing a preference upon liquidation of a bank, which was contrary to the rule of equality of the federal banking law, "must be presumed to have entered into the contract of the parties" so that recognition of the prefer-

ence would not contravene the federal law. This Court made short shrift of that contention:

> "If the law of the State is to be read into the contract, then, of course, the law of Congress should also be read into it. We should thus have to consider all the deposits as made with an implication that they were subject to the Federal law and hence the conflict between the two laws would become evident, and the Federal law being paramount would prevail." (p. 288).

Neither in the present case can the general State law be presumed to have entered into the will of this testatrix.

CONCLUSION.

There is actual conflict between Decedent Estate Law sec. 124 and the purpose—past and present—of federal estate tax law. There is also conflict in respect of the amount to be collected by the federal government. In any event the State has no standing to meddle with the comprehensive federal estate tax system which rests upon complete and independent federal power. The State law destroys the uniform operation of the federal law and is an unworkable supplement to the federal system. The Supremacy Clause justifies and indeed contemplates that any reserved State power must bow to the exercise of federal power. No mere presumption can serve to obscure these fundamental issues.

The order of the Court of Appeals and the decree of the Surrogate's Court entered upon remittitur should be affirmed.

October 14, 1942

Respectfully submitted,

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Appendix 1.

INTERNAL REVENUE CODE SEC. 826. COLLECTION OF UNPAID TAX.

(a) *Sale of Property.*—If the tax herein imposed is not paid on or before the due date thereof the collector shall, upon instruction from the Commissioner, proceed to collect the tax under the provisions of general law; or appropriate proceedings may be commenced in any court of the United States having jurisdiction, in the name of the United States, to subject the property of the decedent to be sold under the judgment or decree of the court. From the proceeds of such sale the amount of the tax, together with the costs and expenses of every description to be allowed by the court, shall be first paid, and the balance shall be deposited according to the order of the court, to be paid under its direction to the person entitled thereto. This subsection in so far as it applies to the collection of a deficiency shall be subject to the provisions of sections 871 and 891.

(b) *Reimbursement Out of Estate.*—If the tax or any part thereof is paid by, or collected out of that part of the estate passing to or in the possession of, any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this subchapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

(c) *Liability of Life Insurance Beneficiaries.*—If any part of the gross estate consists of proceeds of policies of insurance upon the life of the decedent receivable by a beneficiary other than the executor, the executor shall be entitled to recover from such beneficiary such portion of the total tax paid as the proceeds, in excess of $40,000, of such policies bear to the net estate. If there is more than one such beneficiary the executor shall be entitled to recover from such beneficiaries in the same ratio.

Appendix 2.

NEW YORK DECEDENT ESTATE LAW §124. APPORTIONMENT OF FEDERAL AND STATE ESTATE TAXES; EXECUTOR OR ADMINISTRATOR TO DEDUCT TAXES FROM DISTRIBUTIVE SHARES

1. Whenever it appears upon any accounting, or in any appropriate action or proceeding, that an executor, administrator, temporary administrator, trustee or other person acting in a fiduciary capacity, has paid a death tax levied or assessed under the provisions of article ten-c of the tax law, or under the provisions of the United States revenue act of nineteen hundred twenty-six, as amended by the United States revenue act of nineteen hundred twenty-eight, or under any death tax law of the United States hereafter enacted, upon or with respect to any property required to be included in the gross estate of a decedent under the provisions of any such law, the amount of the tax so paid, except in a case where a testator otherwise directs in his will, shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues. Such proration shall be made by the surrogate in the proportion, as near as

may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate, except that in making such proration allowances shall be made for any exemptions granted by the act imposing the tax and for any deductions allowed by such act for the purpose of arriving at the value of the net estate; and except that in cases where a trust is created, or other provision made whereby any person is given an interest in income, or an estate for years, or for life, or other temporary interest in any property or fund, the tax on both such temporary interest and on the remainder thereafter shall be charged against and be paid out of the corpus of such property or fund without apportionment between remainders and temporary estates. For the purposes of this section the term "persons interested in the estate" shall have the same meaning with respect to both state and federal taxes as is given it by section two hundred forty-nine-m of the tax law.

So far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid by the executor as such out of the estate before its distribution. In all cases in which any property required to be included in the gross estate does not come into the possession of the executor as such, he shall be entitled, and it shall be his duty, to recover from whomever is in possession, or from the persons interested in the estate, the proportionate amount of such tax payable by the persons interested in the estate with which such persons interested in the estate are chargeable under the provisions of this section, and the surrogate may by order direct the payment of such amount of tax by such persons to the executor.

No executor, administrator or other person acting in a

fiduciary capacity shall be required to transfer, pay over or distribute any fund or property with respect to which a federal or state tax is imposed until the amount of such tax or taxes due from the devisee, legatee, distributee or other person to whom such property is transferred is paid, or, if the apportionment of tax has not been determined, adequate security is furnished by the transferee for such payment.

2. The surrogate, upon making a determination as provided in subdivision one of this section, shall make a decree or order directing the executor or other fiduciary to charge the prorated amounts against the persons against whom the tax has been so prorated in so far as he is in possession of property or interests of such persons against whom such charge may be made and summarily directing all other persons against whom the tax has been so prorated or who are in possession of property or interests of such persons to make payment of such prorated amounts to such executor or other fiduciary.

3. This section shall not apply to estates of persons dying prior to September first, nineteen hundred thirty.

NEW YORK TAX LAW §249-t. JURISDICTION OF THE SURROGATE.

1. The surrogate's court of every county of the state having jurisdiction to grant letters testamentary or of administration upon the estate of a decedent which estate is subject to tax under this article, or to appoint a trustee of such estate, or any part thereof, or to grant ancillary letters thereon, shall have jurisdiction to hear and determine all questions arising under the provisions of this article, including

specifically, but without limitation, jurisdiction to finally determine the amount of the tax imposed by this article, and to fix and adjudge the proportions in which the same shall be borne by the persons interested in the estate as in section one hundred twenty-four of the decedent estate law provided * * *.

Appendix 3.

Sen. Rep. 114, 61st Cong., 1st session

Inheritance Tax Laws

Digest of the Principal Features of the Laws of Great Britain, France and Germany, Together with an Outline of Inheritance Taxation in the United States and a Collection of Judicial Decisions Relating Thereto.

Introductory.

(P. 7, Emphasis is ours). "1. While inheritance taxes have long been a source of revenue among European countries, it is only within recent years that high progressive rates have been imposed anywhere in Europe except in Switzerland. In the use of progressive inheritance taxes as an important source of revenue, Great Britain may be said to have led the way among the principal countries in the finance act of 1894, which, with some modifications, is still in force. This act, with its amendments, imposes upon estates of decedents, before division, an 'estate duty' graduated, according to the value of the estate, from about 1 per cent on estates between £100 and £500 in value to from 10 to 15 per cent on estates exceeding £750,000 in value. There are, besides, a 'legacy duty' on personal property and a 'succession duty' on real

estate passing to collateral heirs, graduated, according to the relationship existing between the decedent and the heir, from 3 per cent for brothers and sisters to 10 per cent for distant relatives and strangers in blood. *Nominally these taxes apply also to direct heirs, at the rate of 1 per cent, but payment of estate duty* releases direct heirs from legacy or *succession duty.*"

* * * * * *

(P. 8, emphasis is ours). 2. As already remarked, inheritance taxes in Great Britain comprise an **'estate duty'** (which is the development merely of what was formerly a 'probably duty'), **levied in respect of the whole estate before distribution,** a 'legal duty' chargeable against legacies or distributive shares of personal property, and a 'succession duty' by which real estate which passes at death is subjected to taxation. Each of these forms of duty has had its counterpart in taxes imposed by legislation of Congress. Thus, the stamp act of July 6, 1797, imposed a legacy duty (p. 42, herein); by the act of July 1, 1862, another legacy duty was levied, as well as a probate duty (pp. 42, 43, herein); the act of June 30, 1864, amended July 13, 1866, imposed a succession duty (pp. 43, 44, herein), and by the act of April 12, 1898, a progressive legacy duty was again levied (p. 45, herein). The United States Supreme Court, in a decision sustaining the constitutionality of the last mentioned act, after reviewing previous legislation, said:

> 'Thus it came to pass that the system of death duties prevailing in England and that adopted by Congress—leaving out of view the differences in rates and the administrative provisions—were substantially identical, and of a threefold nature, that is, a probate duty charged upon the whole estate, a legacy duty charged upon each legacy or distributive share of personalty, and a suc-

cession duly charged against each interest in real property. (*Knowlton* v. *Moore*, 178 U. S. 51.)"

* * * * * *

(P. 9). A national tax so graduated as to seriously affect swollen fortunes, it may be, would produce a surplus, other sources of revenue remaining unchanged. In this connection the plan followed by the German Empire of allotting a part of the proceeds to the several States is suggestive, the point for consideration being whether this plan of distribution is capable of adaptation, at least in beneficial effect if not by any form of donation or division, by which it could be made to conform to the governmental system established in this country—whether, for example, a Federal inheritance tax could not be framed for the Unites States whereby, for the purpose of expenditure and disbursement pursuant to appropriations for national objects and in furtherance of the general welfare, the proceeds of the tax, in whole or in part, would be apportioned among the several States according to their respective returns, and thus in effect be allowed to remain in the States where collected."

Appendix 4.

The Revenue Act of 1924 was already in process in February, 1924; the House Committee had already reported (H. R. No. 179, 68th Cong., 1st Sess., Cum. Bull. 1939-1, p. 241, dated Feb. 11, 1924). The report of the Senate Committee reads:

"A sentence has been inserted in paragraph (3) and in paragraph (3) of subdivision (b) (of section 303) to make it clear that the amount deductible under these paragraphs on account of bequests, legacies, or devises for the specified benevolent purposes shall be the net

amount distributable for such purposes, after estate, legacy, or inheritance taxes imposed in respect thereof have been deducted therefrom. It is evident that if a testator leaves a residuary estate of $1,000,000 to a charity, but the estate taxes payable out of the residue reduce the amount actually distributed to the charity to $950,000, only the latter amount should be deductible, in computing the amount of the net estate, as a bequest to charity. This sentence so provides" (Sen. Report #398, 68th Cong. (1st Sess.), C. B. 1931-1, p. 290, April 1924).

The House Committee accepted the amendment. Its supplemental report reads:

"An additional sentence has been added to these paragraphs to provide that the amount deductible under such paragraphs on account of bequests, legacies, devises, or transfers for the specified benevolent purposes shall be the net amount distributable for such purposes after estate, legacy, or inheritance taxes imposed in respect thereof have been deducted therefrom" (H. R. #844, 68th Cong. (1st Sess.), C. B. 1939-1, p. 308, May 1924).

Appendix 5.

INTERNAL REVENUE CODE SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined * * * by deducting from the value of the gross estate.

(a) *Exemption.*—An exemption of $100,000;

* * * * *

(d) *Transfers for Public, Charitable, and Religious Uses.* —The amount of all bequests, legacies, devises, or transfers, to or for the use of the United States, any State, Territory, any political subdivision thereof, or the District of Columbia, for exclusively public purposes, or to or for the use of any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes, * * * If the tax imposed by section 810, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under this paragraph, then the amount deductible under this paragraph shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes. The amount of the deduction under this subsection for any transfer shall not exceed the value of the transferred property required to be included in the gross estate.

Appendix 6.

The Survey, November 23, 1918—"Mrs. Sage's Will and the Federal Estate tax," by Robert W. DeForest. The author, after referring to the fact that the charities which were residuary legatees under Mrs. Sage's will bore the entire tax on her large estate (*cf. Edwards* v. *Slocum*, 287 Fed. 651, aff'd 264 U. S. 61), stated:

> "Undoubtedly it is this consideration which has led the Finance Committee of the Senate to propose an amendment to the tax bill already adopted by the House whereby the Federal estate tax shall hereafter be imposed on individual legacies and not on the estate as such, and it is earnestly to be hoped that if any estate

tax remains in the present revenue bill it shall be imposed in this way."

Appendix 7.

PROPOSED REVENUE ACT OF 1942:

"826-(d) *Liability of recipient of property over which decedent had power of appointment.* Unless decedent directs otherwise under his will, if any part of the gross estate upon which the tax has been paid consists of the value of property included in the gross estate under section 811 (f), the executor shall be entitled to recover from the person receiving such property by reason of the exercise, non exercise, or release of a power of appointment such portion of the total tax paid as the value of such property bears to the sum of the net estate and the amount of the exemption allowed in computing the net estate."

The Committee comment on this amendment is as follows: (H. R. 2333, 77th Congress, 2d Session, p. 161)

"A new subsection (d) added to section 826, entitles the executor to recover from the recipient of appointive property the portion of tax allocable to such property. The decedent, however, may provide otherwise in his will. This section applies where the recipient takes or holds the property upon the decedent's exercise, non exercise, or release of the power, regardless of local rules with respect to the receipt of the property from the creator of the power. The purpose of this amendment is to achieve a fair and equitable apportionment of the tax burden attributable in part to appointive property."